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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEONDRE MARQUISE JACKSON,

Defendant and Appellant.

E069751

(Super.Ct.No. FVI17003145)

OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy
Morton, Judge. Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Felicity
Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Deondre Marquise Jackson, pled guilty to accessory to robbery after the fact. (Pen. Code, § 32, count 2.)¹ The court granted defendant three years of felony probation, a term of which required that he submit to a search and seizure of any electronic device in his possession. On appeal, defendant contends the search condition is unconstitutional. We affirm.

I. FACTS AND PROCEDURAL HISTORY²

The victim reported to the police that three males walked up to him outside a retail establishment and asked if they could use his cell phone. The victim agreed, but he did not let them hold his phone; instead, he dialed the number, put it on speaker, and held it toward them to allow them to speak. As the phone began ringing, two of the three men tried to distract the victim by pointing behind him. The other man then forcibly removed the phone from the victim's hand. All three men fled in an awaiting vehicle driven by defendant.

An officer arriving thereafter followed the suspects after the store manager pointed out the vehicle in which defendant and the men were fleeing. The officer conducted a traffic stop and detained defendant while another officer arrived to detain the remaining men. Defendant told another officer he would take him to the area where one of the men had thrown the cell phone. Officers were unable to find the cell phone in the area. One

¹ All further statutory references are to the Penal Code.

² The parties stipulated the complaint and police report would provide the factual basis for the plea. We derive our factual recitation from the police report.

of the other men admitted to taking the phone from the victim. He took an officer to the area where he said he had thrown the cell phone. The officer was then able to locate the victim's cell phone.

The People charged defendant by felony complaint with second degree robbery (count 1; § 211) and accessory after the fact (count 2; § 32). Defendant signed and initialed a declaration agreeing to plead guilty to the count 2 offense in return for three years of felony probation. Defendant additionally signed a document titled "Felony Terms and Conditions of Probation." That document reflected that: "By signing this form, I am agreeing that the Court will withhold pronouncement of judgment in my case, and that I will be granted supervised probation for a period of thirty-six months . . . with the following Terms and Conditions of Probation" One of the terms of probation required that defendant "[s]ubmit to a search and seizure (electronic device) by a government entity of any electronic device that you are an authorized possessor of pursuant to . . . [section] 1546.1[, subdivision] (c)(10)."

Defendant pled guilty as recounted above. In return, the court dismissed the balance of the complaint upon the People's motion. Pursuant to the plea agreement, the court granted defendant felony probation for a term of three years, including conditions that he serve 180 days in jail and "[s]ubmit to a search and seizure (electronic device) by a government entity of any electronic device that you are an authorized possessor of pursuant to . . . [section] 1546.1[, subdivision] (c)(10)."

II. DISCUSSION

A. *Waiver and Forfeiture*

Defendant contends the electronic search condition violates his constitutional rights. The People maintain defendant forfeited any objection to the condition by failing to object below. We hold that defendant waived and forfeited any objection to the condition by expressly agreeing to it.

“Knowing and intelligent waivers are generally required when a criminal defendant gives up ‘any significant right’ [citation], such as . . . constitutional rights” (*People v. Trujillo* (2015) 60 Cal.4th 850, 859.) Courts can require that defendants waive constitutional rights as a condition of probation. (*People v. Garcia* (2017) 2 Cal.5th 792, 798-799 [waiver of patient-therapist privilege for sex offender as a condition of probation not constitutionally infirm]; *People v. Bravo* (1987) 43 Cal.3d 600, 607 [acceptance of probationary search condition waives expectation of traditional 4th Amend. protection].)

“Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. [Citations.] As the United States Supreme Court recognized . . . “[n]o procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.) “[A]n adult

probationer who elects to receive probation in lieu of incarceration fairly may be charged with the need to timely challenge any conditions imposed” (*Id.* at p. 882.) “[A]n unconstitutionally vague or overbroad probation condition does not come within the ‘narrow exception’ to the forfeiture rule made for a so-called unauthorized sentence or a sentence entered in excess of jurisdiction. [Citations.]” (*Id.* at pp. 886-887.) However, “[a]n obvious legal error at sentencing that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture.” (*Id.* at p. 887.) A defendant’s failure to object to the imposition of a probation condition requiring the defendant to permit searches of electronic devices in his possession forfeits the issue on appeal. (*In re L.O.* (2018) 27 Cal.App.5th 706, 711-712; *People v. Valdivia* (2017) 16 Cal.App.5th 1130, 1139, review granted Feb. 14, 2018, S245893.)

Here, apparently prior to even orally entering his plea, defendant signed a document agreeing that the court would grant him probation for three years under a number of expressly enumerated terms and conditions. One of those conditions is the very term of which defendant now complains. Defendant initialed a space directly adjacent to the condition, further indicating his acceptance of the term. The minute order of defendant’s plea and judgment expressly indicates: “Defendant accepts Terms & Conditions of Probation.” The court asked defendant: “[Y]ou indicated you reviewed the terms and conditions of probation with your attorney and you understood them. Do you waive the Court formally reading them in open court?” To which defendant

responded: “Yes, your Honor.” Thus, defendant knowingly and intelligently waived his right to complain about the electronic device term of his probation.

Even if defendant did not waive his right to complain about the condition, he forfeited that right by failing to object below. Here, beyond explicitly agreeing to the condition, defendant did not object to the condition though he had ample opportunity to do so.

Defendant contends that he was not required to object because the condition is facially, unconstitutionally vague and overbroad. We disagree. First, defendant himself repeatedly maintains the condition was not narrowly tailored or reasonably related to the reformation and rehabilitation of defendant, an argument which necessarily requires resort to the facts underlying defendant’s conviction and is therefore, not reviewable without an objection: “Neither [defendant]’s crime, nor the events preceding it, involved his electronic devices or social media.” “[The People] cite[] no facts or authority showing that the monitoring of these conditions is critical to public safety or [defendant]’s rehabilitation. There is no evidence that [defendant] has alcohol or drug dependencies that require invasive searching of electronic devices.” “[I]f, as in [defendant]’s case, there is nothing in [defendant]’s past or current offenses or personal history that connects his use of electronic devices with criminal activity, there is nothing to justify an electronic search condition.” The breadth of the condition “is not justified by any known risk [defendant] poses to the public and is not at all related to [defendant]’s criminality.”

Second, defendant's assertion that his crime did not involve electronic devices is not borne by the record. Defendant executed a *Harvey*³ waiver as part of his plea agreement. Defendant stipulated that the complaint and police report would provide the factual basis for his plea. The complaint charged defendant with both robbery and accessory after the fact. The police report reflects that defendant was part of a scheme to steal a cell phone, an electronic device, from a person outside a store. Thus, defendant's crime did involve an electronic device.

Third, defendant's complaint that "the electronics-search condition does not require that the devices belong to" defendant, that it "only requires that [defendant] have possession" of them is not well taken. As the California Supreme Court stated in *People v. Olguin* (2008) 45 Cal.4th 375: "A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*Id.* at p. 382.) We view the probation condition here in light of *Olguin* and presume a probation officer will not interpret it in an irrational or capricious manner. (*Id.* at p. 383.) We agree with the court in *People v. Maldonado* (2018) 22 Cal.App.5th 138, review granted June 20, 2018, S248800, "that warrantless probation searches must not be conducted in an arbitrary, capricious, or harassing manner. [Citation.]" (*Id.* at p. 145 [electronic device search condition was not constitutionally overbroad].) Moreover, defendant would have no

³ *People v. Harvey* (1979) 25 Cal.3d 754 and *People v. Moser* (1996) 50 Cal.App.4th 130, 132 and 133 (permitting the sentencing court to consider the facts underlying the dismissed counts when the defendant has executed a waiver of his *Harvey* rights).

standing to challenge the constitutional rights of third parties. (*Ibid.*) Thus, defendant forfeited any challenge to the constitutionality of the probation condition by failing to object below.

B. *Overbreadth*

Defendant contends, pursuant to *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473] (warrantless search of defendant’s cell phone was constitutionally infirm), that the probationary condition requiring that defendant submit electronic devices in his possession to search and seizure by officers is unconstitutionally overbroad. Assuming defendant did not waive or forfeit a challenge to the condition, we hold that it was not unconstitutionally overbroad.

“A probation condition is constitutionally overbroad when it substantially limits a person’s rights and those limitations are not closely tailored to the purpose of the condition.” (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641, citing *In re White* (1979) 97 Cal.App.3d 141, 146 [“... The Constitution, the statute, all case law, demand and authorize only “reasonable” conditions, not just conditions “reasonably related” to the crime committed.’ [Citation.] [¶] Careful scrutiny of an unusual and severe probation condition is appropriate.”].)

The parties acknowledge that the issue of whether a probationary electronic device search condition may be constitutionally imposed is currently under review by the

California Supreme Court.⁴ The California Supreme Court has not yet granted review in at least two cases dealing with this issue. In *People v. Appelton* (2016) 245 Cal.App.4th 717, where the defendant pled no contest to imprisonment by means of deceit, the court held that a probationary condition requiring that the defendant's electronic devices be subject to "Forensic Analysis Search[]" was constitutionally overbroad and struck the condition, but remanded the matter "because the trial court may be able to impose a valid condition more narrowly tailored to the state's interests" (*Id.* at p. 727.) In *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, where the defendant stood convicted of criminal threats, resisting an officer, and a true finding on a gang enhancement allegation, the court held: "Access to all of defendant's devices and social media accounts is the only way to see if defendant is ridding himself of his gang associations and activities, as

⁴ The lead case, *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, frames the issue as follows: "Did the trial court err by imposing an 'electronics search condition' on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin*[, *supra*,] 45 Cal.4th 375 because it would facilitate the juvenile's supervision?" <http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2126967&doc_no=S230923&request_token=NiIwLSIkXkg%2FWyBVSSFdTEhIUfQ0UDxTICJeIzhTQCAgCg%3D%3D&bck=yes>(as of Nov. 19, 2018). The court has subsequently granted review in cases in which the condition was applied to adults. (*People v. Valdivia*, *supra*, 16 Cal.App.5th 1130, review granted Feb. 14, 2018, S245893 [electronic search condition reasonably related to future criminality, did not violate constitutional right against self-incrimination, but was constitutionally overbroad]; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1129, review granted Dec. 14, 2016, S238210 [electronic search condition imposed upon a defendant convicted of unlawful sexual intercourse with a minor not unconstitutionally broad and was reasonably tailored to defendant's rehabilitation].)

required by the terms of his probation, or is continuing those associations and activities, in violation of his probation.” (*Id.* at p. 1175.)

We agree with *Ebertowski* and the line of cases which have followed it. “As a defendant who has pleaded guilty to a felony and accepted probation in lieu of additional punishment, defendant has a diminished expectation of privacy as compared to law-abiding citizens or those subject to searches incident to arrest. Thus, we conclude the privacy concerns voiced in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition.” (*People v. Nachbar, supra*, 3 Cal.App.5th at p. 1129, review granted Dec. 14, 2016, S238210.) “To the extent [the defendant] adds information on his electronic devices that would invoke stronger privacy protections beyond a warrantless search of his home and would be unrelated to his criminality or future criminality, [the defendant] would have the right to seek a modification of the probation condition to protect the privacy of such information. [Citations.] But as the record stands now, there is no reasoned basis for more narrowly tailoring the search condition. Additionally, any concerns regarding the potential invasiveness of the electronics-search condition are ameliorated by the restriction against arbitrary, capricious, or harassing probation searches. [Citations.]” (*People v. Trujillo* (2017) 15 Cal.App.5th 574, 589, review granted Nov. 29, 2017, S244650 [probation condition requiring the defendant to submit to searches of electronics in his possession affirmed where the defendant was convicted of attempted robbery and assault by means likely to cause great bodily injury].)

Here, defendant expressly agreed to the condition that electronic devices in his possession be subject to search and seizure in return for a grant of probation. The offense for which defendant stood convicted involved the theft of an electronic device. As noted above, we presume a probation officer will not interpret the search condition in an irrational or capricious manner. (*People v. Olguin, supra*, 45 Cal.4th at p. 383.) If a probation officer does interpret the condition in any arbitrary manner, defendant may then file a petition for modification of his probation condition. (See §§ 1203.2, subd. (b)(1), 1203.3, subd. (a); see *People v. Keele* (1986) 178 Cal.App.3d 701, 708 [trial court retains jurisdiction to review probation officer's actions].) Thus, the electronic device search and seizure condition is not constitutionally overbroad.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.